

LAW OFFICE OF HORACIO PEÑA, JR.

ATTORNEY AT LAW

Horacio Peña, Jr., Attorney and Mediator
Former State District Judge

Mari S. Flores
Paralegal/Office Manager

1926 E. Griffin Pkwy, Ste. 200
Mission, Texas 78572
Tel. (956) 581-8800
Fax. (956) 581-9361

May 3, 2019

Email: [REDACTED]

Hon. Robert L. Galligan
Jones, Galligan, Key & Lozano, LLP
Town Center Tower
P.O. Drawer 1247
Weslaco, Texas 78599-1247

RE: Horacio Peña, Jr.
Vacation and Sick Leave Owed

Dear Mr. Galligan:

I have reviewed your emailed correspondence and the attached exhibits dated April 25, 2019. Please allow this correspondence to serve as my formal response to the City of Mission's refusal to pay my legally owed vacation and sick pay benefits.

Please allow me to begin by giving you and the City of Mission Commissioners a review and history of my association with the City of Mission. Prior to 1987 the City of Mission employed non-attorney Municipal Court Judges, however, the City had amended their ordinance to mandate that a "licensed attorney" would be appointed as judge for the Municipal Court of Mission. As a result of this change I was appointed by the City of Mission as the first ever attorney Municipal Court Judge in April 1987. Needless to say, at the time of my appointment, I was on a probationary period and received no benefits, i.e., health insurance, retirement, or sick leave.

At the time that I accepted the appointment as the Municipal Court Judge for the City of Mission, I worked tirelessly for weeks at a time. The former Municipal Court Judge, the Hon. Juan Rosel, had left thousands of warrants which he had refused to sign. This entailed my reviewing the probable cause affidavits for each warrant before I could sign them. I organized a filing system, of which the court had none, and a method for tracking and executing warrants. I had two court employees with no prior experience or formal training in the court system. In addition, I was on call twenty-four hours a day seven days a week.

After satisfactorily completing my probationary period with the City of Mission, City Manager Mark Watson indicated in writing on the Advice of Change and Authorization of Salary Payment

form that the status of my employment had changed due to the hours which I was working to a salaried employee and I was to receive "standard benefits," including insurance, ICMA, etc. retroactive to April 1, 1987.

In 1987 the Municipal Court was located next to the old City Library on 11th Street, Mission, Texas. The court was eventually moved to the now "old" Mission City Hall, in a small room to the side of the City Council Chamber and held court on a daily basis and all court entries, citations, rulings, etc. were kept in hand-written form. Eventually, through my dogged efforts, the court evolved from the antiquated hand-written records to a computerized system and utilized "Incode" as the court software of preference. I asked the City Council at the time to allow for proper training of the staff in the use of Incode and the related software for the tracking of citations and the depositing of fines and court costs.

The evolution from the antiquated method of operating a court to the modern, up to date, computerized court which was the start of the now fully computerized and stream-lined Municipal Court caused the Hidalgo County District Courts to take notice. The District Court Judges selected the Mission Municipal Court as the "Pilot" program for the kick-start of the Juvenile Conference Committee Program which was spearheaded by Betty Bundy and Mrs. Cecilio Chapa. Mission Municipal Court heard juvenile cases with the help of the Juvenile Conference Committee to reach and try to re-direct juveniles who found themselves in trouble for truancy. As the Municipal Court Judge, in an attempt not to disrupt school hours, I held Juvenile Hearings beginning at 5:00 p.m. which more often than not ran until 10:30 p.m. My job was to take pleas from the juvenile offenders and counsel with them and their parents. This practice continued for approximately seven to twelve years until the Texas Legislature codified the law and allowed Municipal Courts to have jurisdiction over juvenile cases.

Juvenile crime was on a rise in Mission and surrounding local areas. Several times I was called upon to testify in Austin, Texas before the committee which had jurisdiction of juvenile matters and their attempts to house juvenile offenders who needed counseling. This effort was spearheaded by Dr. O'Caña, legislation was drafted and sponsored by Kino Flores and Aaron Peña. My travels and lodging to Austin, Texas, cost the City of Mission nothing. I funded those trips to Austin, Texas from my own personal funds; my dedication to the City of Mission and the Juvenile Program were deep-rooted in my commitment to my job and the City of Mission.

During this time, the Juvenile Conference Committee wanted a greater response and more interaction from the District Court Judges and the local judges. The Honorable Judge Juan Partida (275th Judicial District Court of Hidalgo, Texas) and I visited targeted areas of the city where juvenile crime was rampant. The purpose of our "street walks" was to visit those areas and personally reach out to the parents who needed help with their children but were too afraid to

come forward and seek help from law enforcement. Judge Partida, Ms. Bundy, Ms. Chapa and I developed a plan to “divide” the city into quadrants in order to study the crime rates and conduct our “street-walks” in those areas. We continued this practice and attempted to pass legislation to help these juveniles, their parents, and in short, the families. On October 17, 2002, I organized a round-table discussion/meeting at the Mission Municipal Court with other Municipal Court Judges from the surrounding areas to discuss the many obstacles municipal courts faced regarding the disposition of mounting juvenile cases. We discussed ways to achieve changes through parental and school involvement, and through judicial and new legislation.

These activities were in addition to my participation with local school districts and reaching out to students about their continued education, future careers, and the works and purpose of the judicial system.

My job as the Municipal Court Judge and my work and dedication to the Juvenile Conference Committee was compounded by being on call twenty-four hours a day, seven days a week, when law enforcement would knock on my door at all hours of the night to have me sign warrants. I was also called upon by various City Counsel members to magistrate certain individuals whom they wanted out of jail “immediately” without regard to the time of day or night. My twenty-four hour on-call duty continued until my last day of employment with the City of Mission.

As a result of my, along with others, attempt to pass meaningful legislation for the advent of the oncoming Municipal Court Jurisdiction for Juveniles, I was selected to represent the City of Mission, Texas as a Board Member of the Commission for Judicial Efficiency. I served on the Board with former FBI Director William “Bill” Sessions, Chief Justice Thomas R. Phillips, and Nathan Hecht, along with other State Court Judges. My appointment was to represent the local areas on the study of judicial salaries throughout the State of Texas as they pertained to the different levels of Texas Courts. I served on this committee for two years and attended meetings in Austin, Texas, wherein hearings were held in the Texas Supreme Court Building in Austin, Texas. A report of our findings and efforts was written and is still used today to set judicial compensation for the State of Texas as compared to the salaries of Federal Court Judges. At times I would meet with former 206th State Court District Judge Joe B. Evans to review findings and make further recommendations. Again, my appointment to this committee was made due to my hard work and dedication to the bench and the community during my tenure as the Municipal Court Judge for the City of Mission, Texas.

Mission Municipal Court was eventually moved to the old post office on the east side of the of the building opposite the Mission Police Department. Additional staff were hired and efforts were made to increase the collection of outstanding warrants. I established a system wherein warrants were handled by two warrant officers which were hired by the court. Their job was to

knock on the doors of the defendants who had outstanding warrants and instructed on the options available to them in order to settle their outstanding citations and warrants. My directive to the warrant officers was that no arrests would be made on Class C Misdemeanor warrants, and all defendants were allowed to either pay their fines (by way of installment payments) or community service.

I required that Municipal Court staff attend training sessions in Austin, Texas in order to properly report citations and depositions with the State Office of Court Administration. I held afternoon meetings with the staff to review the implementation of the new law changes and held question and answer sessions in an informal setting.

The City of Mission commenced the construction of the current police department and municipal court. I was asked to spend countless hours with the architects to design the current court which included work areas for staff and the two courtrooms, one of which was designed for jury trials. I was allowed to increase the number of staff members which led to increased service to the community. I implemented the current system whereby double work by the staff is alleviated by recording, entering, and printing all pleas and legal documents at the time of the hearings in the courtroom setting as opposed to having defendants and court staff returning to the work area to enter and sign the legal documents required to dispose of their cases. Further, I asked for and received new computers and upgraded software to implement a more transparent breakdown of reported cases to the Office of Court Administration. This method which I implemented remains in effect today.

During the time that I became an Associate Judge with the Mission Municipal Court, I was asked by the Hidalgo District Attorney's Office to be one of a hand-full of judges to be on call to execute "blood warrants" for Texas DPS officers and local officers on all Driving While Intoxicated (DWI) arrests and DWI related incidents. This entailed law enforcement officers going to my house during all hours of the night and having me review their warrants and probable cause affidavits before affixing my signature to such. Many times these visits were made during the day and law enforcement officers would go to my office during normal working hours, at which time I would have to suspend my meetings with my clients and halt my legal practice while I executed blood warrants.

Lastly, I have been the Director of Region 10 of the Texas Municipal Courts Association for the last two years. I was designated as the Judge for the City of Mission, Texas, to represent Region 10, which consists of 130 cities and 60 Texas Counties. I travel to Bee Cave and Austin, Texas every four months at my expense to meet with Judges from Region 1 through Region 9 to discuss new legislation and educational training centers for all Texas Municipal Courts. During our quarterly meetings we discuss municipal court issues which lobbyists present to the Chief Justice

and Legislators. I continue my work as Director of Region 10, however, since my termination I now represent the City of Palmhurst Municipal Court.

Since the appointment of the current Presiding Judge, no new changes have been implemented. He has however, fazed out the collection of outstanding warrants. The warrant officers are not being utilized to collect fines and as a result there are millions of dollars in outstanding uncollected warrants.

Despite the “opinion” of the current counsel members, I have never been a “part-time” judge. It is offensive to me that I should need to educate the Counsel of my tireless work with the City. It is obvious that certain members of the new administration do not know (or care) about my dedication, hard work, and contributions to the City of Mission. More obvious however, is the fact that I have been signaled out by Commissioner Jessica Ortega-Ochoa for disagreeing with her plan to have an “open docket” at the Mission Municipal Court. As Director for Region 10, I have first-hand knowledge, as do all attorneys and judges, that meeting with defendants on any case without all parties present is unethical. The fact that I questioned and challenged the changes to the court which she demanded set me up as a target for the new administration.

I further feel the Board became dissatisfied with me since my reporting of sexual harassment allegations against Judge Jonathan Wehrmeister as reported to me by various Municipal Court female staff members. It was my obligation to report such to the City Manager. The fact that the individual accused of sexual harassment remains employed while I, with no blemishes to my reputation would be discharged without cause, is further evidence of discrimination as a whistleblower for reporting an alleged wrong-doing by an individual who publicly supported the current administration.

In addition, it was no secret that I supported former Mayor Norberto Salinas in his re-election for Mayor of Mission against Mayor Armando O’Caña and I supported Julian Gonzalez for Commissioner, Place 4 against Gus Martinez. I was advised by several City employees and residents that they had been told by Commissioner Gus Martinez that should he win the election, I “was out” as an Assistant Judge for the City of Mission.

As a result of my disagreement with the Board, and particularly with Commissioner Jessica Ortega-Ochoa, my political affiliation, and whistle-blowing, my reputation has been impugned. I have been accused of working no more than “three hours a week” and the fact that I have been denied my benefits has caused speculation for other City employees and by the residents of Mission, Texas. My accrued vacation and sick leave is a result of YEARS of work as the Presiding Judge in addition to my work as a representative for the City of Mission on several boards and commissions.

Please allow me to address the points which you made in your correspondence to me dated April 26, 2019, wherein you advised me that the "City" had determined that I am not entitled to be paid for vacation and sick leave which I accrued during my tenure as "Assistant" Municipal Court Judge.

1. Vacation and sick leave was accrued during the last thirty years of my employment with the City of Mission - more precisely during my tenure as the Presiding Judge dating back to April 1987, and NOT during my tenure as "Assistant Judge" as stated in your correspondence.

You further stated that there was no employment contract between the City and myself. According to Texas Law, in the absence of a contract, vacation/sick leave pay and accrual must be paid if it is a written policy of the employer. I feel that you and the City of Mission are being disingenuous when you attached Exhibit 4 to your correspondence - you are fully aware, as is the City of Mission, that I was hired PRIOR to 10/01/2012, and the following applies:

2. Texas law (Tex. Admin. Code §821.25) provides that vacation pay and sick leave pay are payable to an employee upon separation from employment only if(2) *a written policy of the employer specifically provides for payment.* Mission has a written policy providing for payment.

Please refer to the Mission Personnel Policy Manual page 111 D. 2 "*Upon separation from employment (resignation, dismissal, retirement, or death) an employee hired prior to 10/01/2012 SHALL be paid for accrued vacation . . .*" and page 144 Appendix "F" - *Regular full-time employees (hired prior to 10/01/2012) with 30+ years of service shall receive 100% of sick leave maximum payout and 100% of vacation leave hours maximum payout.*

Further, Texas Pay Day Law (TWC) states: "*... an employer is not required to offer fringe benefits such as vacation pay, holiday pay, or other pay for hours not worked. However, if the employer offers these benefits in writing, the employer would be obligated to comply with their own policy or employment agreement.*"

Furthermore, Tx. Lab. Code Sec. 61.0014 states: "Terminated employees must be paid in full within six days."

At the time of my initial employment, I was not at first slated to receive benefits except for social security. However, by your own admission and as is clearly evidenced on the Advice of Change

and Authorization of Salary Payment, City Manager Mark Watson changed my status and clearly stated that I was to receive standard benefits. Had the intention of the City Manager at that time been that I not receive payments for unused/accrued vacation/sick leave pay, he would have clearly stated so. Furthermore, your own policy dictates that "part-time employees" are not eligible for the City's benefits package - obviously, if I were a part-time employee as you state, I would not be eligible, nor would I have been able to receive the City's benefits package.

Furthermore, my paychecks, including my last paycheck dated April 26, 2019 clearly reflects all of my accrued vacation and sick leave. In September 2017, I had attempted to use some of my accrued vacation/sick leave, however, Martin Garza (previous City Manager) and Judge Jonathan Wehrmeister denied me that opportunity, stating that my performance was required and I could collect pay for the accrued hours at the time of separation from employment.

The case law which you cited in your correspondence in no manner applies to me or my situation.

3. *Ryan v Superior Oil Co.*, 813 S.W. 2d 594 (Tex. App.-Houston [14th Dist.] 1991, writ denied. In that case, Ryan, at the time of separation from employment, failed to demonstrate damages as he received a severance package which included pay which far exceeded any and all accrued and unpaid vacation/sick leave. In my case, I can prove damages. I am being denied pay for accrued vacation/sick leave and I have received no severance package, unlike former City Manager Martin Garza.
4. *Brown v. Sabre, Inc.*, 173 S.W. 3d 581 (Tex. App.-Fort Worth 2005, no pet.). In that case employees of Sabre were not entitled to payment for unused vacation days. Further, employees were required to use their entire vacation and could not carry over days to the following year. Brown failed to use his vacation prior to his transition to another company. The City of Mission in its own policy, provides for accrual (year to year) of vacation/sick leave and for the payment of accrued and unused vacation/sick leave. Again, the accrual of such is clearly stated in each of my paychecks from the City of Mission.

It is evident that I have been made an exception to the policies of the City of Mission for no reason other than a personal vendetta against me by Jessica Ortega-Ochoa, Gus Martinez, and the other Commissioners due to my voiced opinion regarding their demands regarding the availability of the Municipal Court Judges to defendants outside of normal called court dockets.

5. Ex-parte communication is defined as *“written or oral communication directly with the judge about the issues in the case without the knowledge of the other parties (police/enforcement officer) or their attorney.”* which is forbidden except in cases as set forth in Canon 6 2(c)

It is my intention to file suit against the City of Mission and individual City Council Members who have impugned my reputation in my community where I have faithfully served for thirty years. The discrimination against me is obvious, especially when the City of Mission found no objection when it fully complied with its own policy when former City Manager Isauro Treviño was investigated and arrested by the FBI, indicted, and convicted of criminal actions while he was employed by the City. The City of Mission has also found no objection to the continued employment of its current Presiding Judge despite allegations of sexual harassment, under whose tenure so much conflict has arisen, including surmounting uncollected warrants, low employee moral, increasing employee resignations, and personal request for special treatment for a family member arrested for DWI.

The discrimination with which I have been dealt is nothing more than a power structure that protects its favorites and destroys those it dislikes or disagrees with. This is a clear violation of the law.

Prior to filing suit, I make one last and final demand upon the City of Mission to comply with my request as stated in my correspondence dated April 10, 2019. In exchange for your compliance I will sign a release wherein I hold harmless the City of Mission and the Mission Council Members and Mayor Armando Ocaña in their official and individual capacity.

Failing to comply, I will file suit as indicated above requesting my accrued leave pay, interest, court costs, attorney's fees and any other damages allowed by law.

In conclusion, considering my reputation and that of the current administration whose election is fraught with suspicious voter practices, rumors and legal proceedings, I believe that a jury would rule in my favor.

I hope that the City of Mission will reconsider their decision and that my exit as a servant for the City of Mission may conclude in manner that will allow all parties the opportunity to finalize this transition with dignity and professionalism. In addition, pursuant to V.T.C.A. Gov. Code Sec. 551.074(2)(b)(a), should the council members wish to meet in executive session to discuss my demand and deliberate any possible action, as the subject of such deliberation, I hereby make demand that such deliberation and vote be placed on the agenda of the City Mission Council

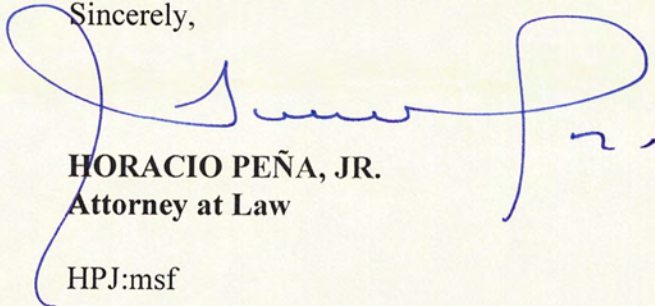
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Regular and/or Special Meeting before a public hearing.

I await your prompt response.

Sincerely,



HORACIO PEÑA, JR.
Attorney at Law

HPJ:msf

xc: Mission City Mayor
Dr. Armando O'Caña
1201 E. 8th Street
Mission, Texas 78572

Email: [REDACTED]
And Hand-Delivery

Mission City Manager
Randy Perez
1201 E. 8th Street
Mission, Texas 78572

Email: [REDACTED]
And Hand-Delivery

Mission Council Pl. 1
Jessica Ortega-Ochoa
1201 E. 8th Street
Mission, Texas 78572

Via Hand-Delivery

Mission Council Pl. 2
Ruben Plata
1201 E. 8th Street
Mission, Texas 78572

Via Hand-Delivery

Mission Council Pl. 3
Norie Gonzalez Garza
1201 E. 8th Street
Mission, Texas 78572

Via Hand-Delivery

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Mission Council Pl. 4
Gus Martinez
1201 E. 8th Street
Mission, Texas 78572

Via Hand-Delivery

✓ The Progress Times
News Desk
1217 N. Conway Ave.
Mission, Texas 78572

Via Hand-Delivery

The Monitor
News Desk
1400 E. Nolana
McAllen, Texas 78504

Via Hand-Delivery